Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

TEXAS LOTTERY COMMISSION et al.,

Petitioners,

v.

SCOTT WENNER et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT SCOTT WENNER'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. The preliminary injunction allowed Pic-A-State to continue operating its business 1

B. The Commission is not an innocent victim of Pic-A-State 3

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. The Court of Appeals' Opinion Does Not Conflict with this Court's Decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) 4

II. The Court of Appeals' Opinion Does Not Conflict with the Decisions from the Second, Eighth, and Ninth Circuits 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909) 5

Edgar v. MITE Corp., 457 U.S. 624 (1982) 10

Guzman v. Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO, 72 F.3d 260 (2d Cir. 1995) 7, 9

Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) ...4, 5-6

McMullen v. Hoffman, 174 U.S. 639 (1899) 5

Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) 8, 9

Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032 (9th Cir.), *cert. denied*, 513 U.S. 822 (1994) 7, 8, 9

Pic-A-State PA, Inc. v. Pennsylvania, 42 F.3d 175 (3d Cir. 1994) 3-4

Pic-A-State PA, Inc. v. Reno, 76 F.3d 1294 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996) 2, 3, 10

University of Tex. v. Camenisch, 451 U.S. 390 (1981) ...7, 9

RULE

FED. R. CIV. P. 65(c) 6, 7, 8, 9

STATUTE

Violent Crime Control and Law Enforcement Act of 1994 (Interstate Wagering Amendment), Pub. L. No. 103-322, 108 Stat. 2126 ..... 1, 2, 3, 6, 10

RESPONDENT SCOTT WENNER'S BRIEF IN OPPOSITION

Respondent Scott Wenner (Wenner) respectfully requests that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Wenner clarifies the following facts that have been misstated or incompletely stated by petitioners Texas Lottery Commission et al. (collectively referred to as the Commission).

A. The preliminary injunction allowed Pic-A-State to continue operating its business.

The Pennsylvania district court on September 26, 1994 issued a preliminary injunction staying enforcement of the Interstate Wagering Amendment, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320905, 108 Stat. 2126, 2147. (R. 1155-57). The Commission states that the preliminary injunction was "narrowly drawn," (Pet. 4), but omits other relevant terms of the injunction. The Pennsylvania district court only stated that the injunction was "narrowly drawn" in that it applied to Pic-A-State and not to similar businesses. (R. 1156).

The court also found that without the stay of the Interstate Wagering Amendment granted by the injunction, Pic-A-State would be "prohibited from operating their business, but more importantly, their entire business

would be destroyed." (R. 1156). Thus, the very purpose of the preliminary injunction was to permit Pic-A-State to continue its business.

The effect of the stay of the Interstate Wagering Amendment granted by the preliminary injunction was to preserve the status quo. (App. 7a, 11a). Maintaining the status quo would preserve the state of affairs existing prior to the enactment of the Interstate Wagering Amendment. It is undisputed that prior to the Interstate Wagering Amendment, Pic-A-State was operating legally. (App. 2a-4a). *See also Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1297-98 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996). Maintaining the status quo must, therefore, have meant to make Pic-A-State's conduct during the stay the same as it was before the enactment of the Interstate Wagering Amendment–legal. As a result, Pic-A-State was permitted to operate and Wenner was permitted to not only purchase a lottery ticket from Pic-A-State, but also to win.

The Commission also implies that while Pic-A-State was protected by the stay of the enforcement of the Interstate Wagering Amendment, its customers such as Wenner were not. (Pet. 7, 8). But the express purpose of the stay was to permit Pic-A-State to continue operating its business. (R. 1155-57). If Pic-A-State's transactions with its customers were not protected by the preliminary injunction, then the injunction would have been a nullity.

Pic-A-State's conduct was protected by the stay and was, therefore, legal. As a result, there is no illegality to prevent enforcement of Wenner's contract with the Commission, his winning lottery ticket.

B. The Commission is not an innocent victim of Pic-A-State.

The Commission claims that "the Texas Lottery did not know it was receiving funds from Pic-A-State." (Pet. 6). This statement is patently false. The Commission has twice paid winning lottery tickets (5 out of 6 numbers) purchased by Pic-A-State at the very same location where Wenner's winning ticket was purchased, Heart's Liquors, and mailed the winning proceeds to Pic-A-State's corporate headquarters in New Jersey. (R. 415-16). The Commission also participated in the Pennsylvania litigation as amicus curiae against Pic-A-State. *See Pic-A-State PA, Inc. v. Pennsylvania*, 42 F.3d 175, 176 (3d Cir. 1994). The Commission further admitted that it was investigating Pic-A-State before Wenner purchased his winning ticket on November 23, 1994. (R. 763).

The Commission took no action, however, to notify its agent at Heart's Liquors not to deal with Pic-A-State. The Commission also did not try to prevent Pic-A-State's contributions to the Texas Lottery by the purchase of tickets. That is, until Wenner won.

The Commission also argues that, because Wenner is a police officer, he should be imputed with knowledge that the State of Pennsylvania has been claiming since 1991 that Pic-A-State's operations were illegal. (Pet. 6). This claim is incredible. First, the Commission apparently forgets that Pennsylvania's challenges prior to the passage of the Interstate Wagering Amendment were unsuccessful. *See Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1297 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996); *Pic-A-State PA,*

Inc. v. Pennsylvania, 42 F.3d 175, 177 (3d Cir. 1994). Second, it strains credibility to argue that a citizen–a police officer or not–has constructive knowledge of two-month-old civil litigation in federal court in which there has not even been an opinion or published order issued. There is no evidence in the record that Wenner knew Pic-A-State's business was anything but legal.

REASONS WHY THE PETITION SHOULD BE DENIED

The Commission's eleventh-hour claims that the court of appeals' opinion conflicts with decisions of this Court and other circuits is transparent and does not warrant review by this Court. The alleged conflicts were never raised in the court below–because they in fact do not exist. The decision of the court of appeals is a correct application of the law to the unique facts presented.

I. The Court of Appeals' Opinion Does Not Conflict with this Court's Decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

The Commission argues that the court of appeals seemed to employ a balancing test in determining whether the contract was enforceable. (Pet. 6). The Commission further argues that the court of appeals' opinion somehow conflicts with this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). (Pet. 5-6). The Commission is incorrect on both points.

First, the court of appeals did not apply a balancing test in its decision in this case. Rather, the court determined that the contract arising from the lottery ticket purchase was not illegal. (App. 7a). There is simply no basis in the record to support the Commission's claim that the court of appeals applied a balancing test.

Second, there is no conceivable conflict between the court of appeals' opinion and this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). In *Kaiser Steel*, the lower courts held that even if the agreement in question was unlawful, the defense of illegality was not available. *Id.* at 76, 78-79. This Court granted Kaiser's petition for writ of certiorari and held that the lower courts erred in rejecting Kaiser's defense of illegality. *Id.* at 76-77, 78-79. This Court noted that it was well settled that "illegal promises will not be enforced in cases controlled by the federal law." *Id.* at 77 (discussing *McMullen v. Hoffman*, 174 U.S. 639 (1899), and *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909)).

The court of appeals' opinion in this case does not conflict with *Kaiser Steel*. The courts of appeals simply held that the contract in this case was not illegal. (App. 7a). It did not hold that the Commission's defense of illegality was unavailable or that an illegal contract is enforceable. Thus, the Commission's claim of a conflict with *Kaiser Steel* fails.

Finally, it should be noted that the Commission did not in the court below complain of the application of any balancing test, point out any alleged conflict with this Court's decision in *Kaiser Steel*, or even cite the *Kaiser*

Steel decision to the court. This Court should decline to review the Commission's belated claim of conflict.

II. The Court of Appeals' Opinion Does Not Conflict with the Decisions from the Second, Eighth, and Ninth Circuits.

The Commission now argues that the opinion of the Fifth Circuit in this case conflicts with decisions of the Second, Eighth, and Ninth Circuits. (Pet. 7, 10-11). This argument is also without merit.

The court of appeals in this case determined that the Pennsylvania district court properly issued the preliminary injunction against enforcement of the Interstate Wagering Amendment. (App. 7a, 10a). The court of appeals held that the injunction preserved the status quo and maintained the legality of Pic-A-State's activities while the injunction was in effect. (App. 7a, 9a-11a). The court's opinion does not conflict with the decisions of the Second, Eighth, and Ninth Circuits cited by the Commission.

The decisions cited by the Commission primarily deal with execution on security for injunctions under rule 65 of the Federal Rules of Civil Procedure and whether a party was "wrongfully enjoined" under that rule. Rule 65(c) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any

> party who is found to have been *wrongfully enjoined* or restrained.

FED. R. CIV. P. 65(c) (emphasis added). The case sub judice has nothing to do with rule 65(c) or the execution on security posted for an injunction. In fact, there was no bond required by the Pennsylvania district court for the temporary restraining order or preliminary injunction issued in this case. (App. 9a n.8).

In *Guzman v. Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO*, 72 F.3d 260 (2d Cir. 1995), the Union was ordered to mail Guzman's campaign literature at Union expense. *Id.* at 262. The issue on appeal was whether the preliminary injunction was properly issued. *Id.* at 262-63. Because the mailing could not be undone, there was no longer any live controversy and the court dismissed the appeal as moot. *Id.* at 261, 262-63.

The Second Circuit in *Guzman* went on in dicta to discuss whether the Union had been wrongfully enjoined under rule 65(c) so that it could recover the mailing costs from Guzman. *Id.* at 263. The court was careful to distinguish between the issue of whether the district court exceeded its discretion in issuing the preliminary injunction and the issue of whether the party was wrongfully enjoined under rule 65(c). *Id; see also University of Tex. v. Camenisch*, 451 U.S. 390, 393 (1981) (significant difference between whether preliminary injunction should have issued and final resolution of merits of the case).

In *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir.), *cert. denied*, 513 U.S. 822 (1994), Nintendo obtained a preliminary injunction against Galoob's sale of the Game Genie and was required to post a

$15 million bond as security for the injunction. *Id.* at 1034. Galoob, however, ultimately prevailed at the trial on the merits. *Id.* The district court vacated the preliminary injunction and, pursuant to rule 65(c), awarded Galoob the $15 million bond. *Id.* at 1034, 1036. The issue on appeal was whether Galoob was wrongfully enjoined under rule 65(c). *Id.* at 1036. The Ninth Circuit held that Galoob was wrongfully enjoined within the meaning of rule 65(c) because it had the right all along to do what it was enjoined from doing. *Id.* The court also noted that "[a] court that complies with the applicable law in issuing a preliminary injunction does not 'wrongfully' issue it." *Id.* at 1036 n.4.

In *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), the carriers obtained a temporary restraining order enjoining the Interstate Commerce Commission's order canceling their then existing rates. *Id.* at 215. The carriers were later denied a preliminary injunction, and the court dissolved the temporary restraining order. *Id.* at 215, 217. The shippers sought restitution from the carriers for the shipping rates that were charged during the existence of the temporary restraining order because, had the ICC order gone into effect at the time planned, the rates would have been lower. *Id.* at 218. The Eighth Circuit held that the shippers were entitled to restitution because the remedy is available to persons who are injured by the restraint of an administrative order where the restraint was not warranted. *Id.* at 241-42. The court also noted that the restraint is only wrongful where the party who obtained its benefit is later found not to have been entitled to it or has failed to ultimately prevail on the merits;

this determination does not, however, mean that the district court acted improperly in granting a temporary restraining order or preliminary injunction. *Id.* at 241 n.4.

The court of appeals' decision in this case in no way conflicts with the Second Circuit's decision in *Guzman*, the Ninth Circuit's decision in *Nintendo*, or the Eighth Circuit's decision in *Middlewest Motor Freight*. This case has nothing to do with a party being wrongfully enjoined under rule 65(c), recovery against security posted for an injunction, or issues regarding restitution. There was no bond required in this case, (App. 9a n.8), and there is no claim for money damages as there was in those cases. Further, the Commission again failed to point out to the court below any alleged conflict with the Second, Eighth, or Ninth Circuits or even cite *Guzman*, *Nintendo*, or *Middlewest Motor Freight* to the court.

As the cases cited by the Commission demonstrate, the issue of whether a party is wrongfully enjoined under rule 65(c) is distinct from the issue of whether the court abused its discretion in issuing a preliminary injunction. *Guzman*, 72 F.3d at 263; *Nintendo*, 16 F.3d at 1036 n.4; *Middlewest Motor Freight*, 433 F.2d at 241 n.4; *see also University of Tex.*, 451 U.S. at 393. The court of appeals in this case specifically found that the preliminary injunction issued by the Pennsylvania district court was correctly and legally issued. (App. 10a-11a). The Commission has not challenged this determination.

The issue in this case is whether Pic-A-State's actions, taken under protection of a preliminary injunction that was later dissolved, are legal. (App. 7a-12a). The court of appeals correctly held that the preliminary injunction

preserved the status quo which existed prior to the enactment of the Interstate Wagering Amendment, thereby maintaining the legality of Pic-A-State's actions. (App. 7a).

The Commission asserts that it is unsettled in this Court whether a preliminary injunction, which is later dissolved, is a complete defense to civil or criminal penalties for actions taken during the pendency of the injunction. (Pet. at 7-8) (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)). The Court need not decide the issue in this case. There are no civil or criminal penalties at stake in this litigation. At issue is simply whether the stay of the Interstate Wagering Amendment granted by the preliminary injunction preserved the status quo.

Finally, this is a unique set of facts that is unlikely to recur. The Interstate Wagering Amendment has been declared constitutional. *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1304 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996). The Interstate Wagering Amendment was explicitly intended to prohibit Pic-A-State's line of business, *id.* at 1297, and has been successful in that effort: Pic-A-State has now gone out of business, *id.* at 1298. (App. 5a). It is, therefore, extremely unlikely that the factual scenario in this case will ever be presented again.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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